

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 77118-S43Q BY KENNETH R.)	
BRANDT, SR.)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 11, 1991, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit No. 77118-s43Q by Kenneth R. Brandt, Sr. is hereby denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

CASE # 77118

FILMED
NOV 25 1991

Dated this 10th day of October, 1991.

Richard M. Andersen
Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 10th day of October, 1991 as follows:

Kenneth R. Brandt, Sr.
1022 Avenue D
Billings, MT 59102

Duane R. Bender
Vicki L. Bender
P.O. Box 31553
Billings, MT 59107

Mrs. Lela Robinson
3204 Robindale Drive
Billings, MT 59101

Gladys D. Sharon
3628 Sharon Drive
Billings, MT 59101

Jim Sticka
3140 Robindale Drive
Billings, MT 59101

Zena K. Wright
2555 Blue Creek Road
Billings, MT 59101

Irvin Atchison, Atchison Inc.
2601 Blue Creek Rte
Billings, MT 59101

Detta Graham
2438 Correen Drive
Billings, MT 59107

Maxine E. Oliver
George E. Oliver, Jr.
121 Monroe St.
Billings, MT 59101

Keith Kerbel, Manager
Billings Water Resources
Regional Office
1537 Avenue D, Suite 121
Billings, MT 59102

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

Cindy G. Campbell
Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 77118-s43Q BY KENNETH R.)
BRANDT, SR.)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was convened in the above-entitled matter on July 31, 1991, in Billings, Montana, to determine whether the above Application should be granted to Kenneth R. Brandt, Sr. under the criteria in § 85-2-311(1), MCA.

Applicant Kenneth R. Brandt, Sr. appeared at the hearing pro se.

Objector Mrs. Lela Robinson appeared at the hearing pro se.

Objector Gladys D. Sharon appeared at the hearing pro se.

Objector Irvin Atchison of Atchison Inc. appeared at the hearing pro se.

Objector Jim Sticka appeared at the hearing by and through Mrs. Lela Robinson.

Tim Kuehn, Water Right Specialist with the Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

Objectors Duane R. and Vicki L. Bender and Zena K. Wright did not appear at the hearing; therefore, in accordance with ARM 36.12.208 these Objectors are in default and their objections are hereby dismissed.

CASE # 77118

FILMED
SEP 17 1991

EXHIBITS

Applicant's Exhibit 1 is a three-dimensional schematic of the proposed means of diversion.

Objector Lela Robinson's Exhibit 1 is a letter from Objector Jim Sticka authorizing Mrs. Robinson to speak on his behalf.

Department's Exhibit 1 consists of two copies of parts of an aerial photograph depicting the project and surrounding area. Each Objector who attended the hearing identified the approximate location of his or her point of diversion in black ink.

All exhibits were accepted into the record without objection.

The Department file was made available for review by all parties. There were no objections to any part of the file; therefore, it is accepted into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Kenneth R. Brandt, Sr. duly filed the above-entitled Application with the Department on February 19, 1991.

3. Pertinent portions of the Application were published in the Billings Gazette on March 27, 1991.

4. In the Application, Applicant proposed to install a headgate on Little Basin Creek at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 2 South, Range 26 East, in Yellowstone County. However, at the hearing Applicant changed his means of diversion to be a "spillway" in the creek with a six-inch pipe in the bottom and a ditch to be located on the left side of the "spillway." The proposed ditch would carry the water to a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 10 to irrigate three acres of trees by means of a contour ditch system. The proposed period of diversion and use is March 15 through September 30, inclusive of each year. Applicant is proposing to appropriate only the excess waters which occur during high runoff periods.

5. "Spillway" is not a good term for the structure. The structure is a dam. Theoretically the diversion would allow the normal flow of Little Basin Creek to pass through the six-inch pipe in the bottom of the dam. However, the Applicant offered no evidence that the six-inch pipe would pass the normal flow of the stream. During periods of high flow the excess water would flow over the dam with part of the water flowing into the ditch on the left side of the dam, then on the proposed place of use. The ditch would be 12 to 18 inches higher than the six-inch pipe. Applicant did not specify whether the bottom of the ditch or the top of the ditch would be 12 to 18 inches higher nor did he specify how deep the ditch would be. Applicant did not specify

what material would be used to build the dam. (Testimony of Applicant and Applicant's Exhibit 1.)

6. The Blue Creek area has sudden cloud bursts. On Friday, July 26, 1991, such a storm occurred. The amount of water in Little Basin Creek was not measured by any of the parties; however, Applicant stated that a four foot culvert would not have handled the runoff.

7. Objector Mrs. Lela Robinson filed Statement of Claim No. W023265-43Q with the Water Court of Montana. Mrs. Robinson claims a priority date of November 15, 1903.

8. Objector Gladys D. Sharon filed Statement of Claim No. 26764-43Q with the Water Court of Montana. Ms. Sharon claims a priority date of November 15, 1903.

9. Objector Jim Sticka filed Statement of Claim No. W024122-43Q with the Water Court of Montana. Mr. Sticka claims a priority date of October 5, 1903.

10. Objector Irvin Atchison filed Statement of Claim No. W100906-43Q with the Water Court of Montana. Mr. Atchison claims a decreed priority date of October 15, 1883.

11. There are no planned uses or developments for which a permit has been issued or for which water has been reserved. (Department records.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field

reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. Applicant has not provided substantial credible evidence that the proposed means of diversion is adequate. Applicant submitted no specifications nor project plan. If the dam were constructed of earth, a storm such as the one which occurred on July 26, 1991, would completely remove the structure. See Finding of Fact 5 and 6.

6. Since an Applicant is required to show by substantial credible evidence that all the criteria necessary for issuance of a permit have been met, and since Applicant in this matter has failed to demonstrate the proposed means of diversion and operation of the appropriation works are adequate, no finding is necessary as to whether there are unappropriated waters in the source of supply, whether the water rights of prior appropriators would be adversely affected, or whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See In re Application No. 53221-s400 by Carney; In re Application No 61333-s40A by Pitsch.

In denying the Application at this point, the Hearing Examiner has not determined that the proposed appropriation could

not be granted, given sufficient credible evidence that the criteria for issuance of a permit have been met.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER


Application for Beneficial Water Use Permit No. 77118-s43Q by Kenneth R. Brandt, Sr. is hereby denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 11th day of September, 1991.


Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6625

CERTIFICATE OF SERVICE

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